

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0401

VICKIE BAXTER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CSA, LIMITED)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	DATE ISSUED: 02/07/2020
OF PENNSYLVANIA, c/o AIG CLAIMS)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order Cancelling Hearing/Order of Remand and the Order Denying Claimant's Motion for Reconsideration of the Court's Remand to the District Director to Address Claimant's Issue of Permanent Disability Not Raised Previously of Dana Rosen, Administrative Law Judge, United States Department of Labor.

Howard S. Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for claimant.

John F. Karpousis and William H. Yost (Freehill Hogan & Mahar, LLP), New York, New York, for employer/carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judges, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Order Cancelling Hearing/Order of Remand and the Order Denying Claimant's Motion for Reconsideration of the Court's Remand to the District Director to Address Claimant's Issue of Permanent Disability Not Raised Previously (2017-LDA-00510) of Administrative Law Judge Dana Rosen rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Board for the third time.

This case has a protracted history. Claimant, while working for employer as a warehouse supervisor in Kuwait, sustained injuries to her neck, back, and knees as a result of three separate motor vehicle accidents that occurred on April 8, May 1, and May 20, 2010. Claimant also alleged she sustained a psychological injury as a result of her work for employer. Employer voluntarily paid disability and some medical benefits, but a dispute arose regarding employer's liability for certain medical treatments. The administrative law judge addressed this dispute in her 2015 decision, which the Board affirmed.¹ *Baxter v. CSA, Limited*, BRB No. 15-0358 (Jan. 19, 2016) (unpub.). Another

¹Claimant sought, and employer declined to pay for, surgery on her left knee, a third MRI on her back, and a dorsal spinal column stimulator. The administrative law judge awarded claimant medical benefits for her left knee surgery and the MRI, but denied the request for a dorsal spinal column stimulator. The administrative law judge also concluded, based on the parties' stipulations, that: 1) claimant has been temporarily totally disabled from July 7, 2010 to the present; 2) employer has paid temporary total disability from July 7, 2010 to the present; and 3) all medical benefits other than those "currently in dispute" have been paid.

dispute arose over medical benefits prompting the parties to seek a formal hearing, which was scheduled for March 22, 2018.

Prior to the hearing, employer suspended payment of compensation benefits under 33 U.S.C. §907(d)(4) as a result of claimant's refusals to comply with its requests that she attend medical examinations and complete medical authorization forms. Thus, employer filed motions to compel claimant's compliance with its requests. Claimant countered by filing her LS-18 pre-hearing statement on April 6, 2017, as well as a motion to reinstate payments of disability benefits. In an Order dated June 29, 2017, the administrative law judge denied employer's motions to compel, as well as claimant's cross-motion to reinstate benefits. Nevertheless, on November 1, 2017, employer reinstated payment of temporary total disability benefits, which included a lump sum payment covering the period of suspension.

In an Order dated January 11, 2018, the administrative law judge denied claimant's motion to compel discovery, granted employer's motion to cancel the March 22, 2018 hearing, and remanded the case to the district director for any further action. Claimant appealed. The Board vacated the administrative law judge's January 2018 Order, stating it "cannot [be] ascertain[ed] from the administrative law judge's decision or from the record presently before us whether a controversy remains between the parties." *Baxter v. CSA, Limited [Baxter II]*, BRB No. 18-0200, slip op. at 5 (Oct. 30, 2018) (unpub.). The Board remanded for the administrative law judge to address whether: (1) employer had withdrawn its controversion under 20 C.F.R. §702.351;² (2) the case could be resolved at the district director level without adjudication; (3) any disagreements between the parties remained; and (4) any party wanted the issuance of a compensation order. *Id.*, slip op. at 6. If the parties agreed on all issues, the Board stated the administrative law judge could again remand the case to the district director. *Id.*

²Section 702.351 of the regulations states:

Whenever a party withdraws his controversion of the issues set for a formal hearing, the administrative law judge shall halt the proceedings upon receipt from said party of a signed statement to that effect and forthwith notify the district director who shall then proceed to dispose of the case as provided for in § 702.315.

20 C.F.R. §702.351. Section 702.315 authorizes the district director to issue a stipulated compensation order when the parties are in full agreement. 20 C.F.R. §702.315.

On remand, the administrative law judge scheduled a formal hearing for June 6, 2019. However, following a status conference with the administrative law judge to identify issues for resolution at the hearing, employer filed a Motion for Remand or Alternatively a Motion to Compel and/or Extend the Discovery Deadline and/or Adjourn the Formal Hearing Scheduled for June 6, 2019. Employer sought remand to the district director because claimant “did not list permanent disability in her LS-18 and failed to raise it as an issue until March 27, 2019, nearly six weeks” after the administrative law judge’s February 15, 2019 scheduling order. In response, claimant maintained that remand was unnecessary because employer had an adequate “amount of time to defend” the claim for permanent disability benefits and 20 C.F.R. §702.336(b) gives the administrative law judge the discretion to consider “any new issue.” In her May 9, 2019 Order Cancelling Hearing/Order of Remand, the administrative law judge granted employer’s motion, cancelled the June 6, 2019 hearing, and remanded the case to the district director to enable: claimant to properly raise the “new” permanency issue; employer the opportunity to raise Section 8(f) relief, 33 U.S.C. §908(f), to avoid the absolute bar to apportionment of liability to the Special Fund at 33 U.S.C. §908(f)(3); and the parties the opportunity to complete discovery. The administrative law judge denied claimant’s motion for reconsideration of the remand order.

On appeal, claimant challenges the administrative law judge’s decision to cancel the formal hearing and remand the case to the district director because outstanding issues remain in dispute requiring adjudication through the formal hearing process. Employer responds, urging affirmance of the administrative law judge’s actions in this case. The Director, Office of Workers’ Compensation Programs (the Director), responds, agreeing with claimant and requesting the Board vacate the administrative law judge’s orders and instruct her to schedule and hold a formal hearing in this case. We agree with claimant and the Director that the administrative law judge erred in again remanding the case to the district director.

The administrative law judge remanded the case to the district director to address the issue of permanency claimant allegedly raised for the first time in March 2019. In reaching this conclusion, the administrative law judge found it significant that, without a remand to the district director, any request by employer for Section 8(f) relief would be subject to the absolute bar of Section 8(f)(3) because it had not had the opportunity to consider filing a Section 8(f) application before the district director. She also found it significant that “claimant is being paid temporary total disability by employer.” Order Cancelling Hearing at 2. These reasons are legally inadequate bases for remanding the case to the district director.

First, as the Director notes, the administrative law judge did not follow the Board's instructions to determine "whether the case can be resolved at the district director level without adjudication of any disputed issues."³ *Baxter II*, slip op. at 6; *see also* 20 C.F.R. §802.405(a). Instead, the administrative law judge cited Section 702.336(a)⁴ and remanded the case to the district director. Remand under this provision is appropriate, however, when the new issue arises from evidence the district director did not previously consider and "is likely to resolve the case without the need for a formal hearing." Thus, in accordance with the Board's remand instructions, the administrative law judge should have initially determined whether the parties are in agreement on all issues in this case, including specifically whether a formal hearing might be required to resolve the permanency issue.

Second, claimant raised permanency as an issue before the administrative law judge ten weeks before the scheduled hearing.⁵ Section 702.336(b) permits the administrative law judge to consider new issues "[a]t any time prior to the filing of the compensation order

³The Board noted the district director is not empowered to adjudicate disputed claims. *Baxter v. CSA, Limited [Baxter II]*, BRB No. 18-0200, slip op. at 6 (Oct. 30, 2018) (unpub.).

⁴Section 702.336(a) provides:

If, during the course of the formal hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. If in the opinion of the administrative law judge the new issue requires additional time for preparation, the parties shall be given a reasonable time within which to prepare for it. If the new issue arises from evidence that has not been considered by the district director, and such evidence is likely to resolve the case without the need for a formal hearing, the administrative law judge may remand the case to the district director for his or her evaluation and recommendation pursuant to §702.316.

20 C.F.R. §702.336(a).

⁵The regulation at 29 C.F.R. §18.50 of the Office of Administrative Law Judges Rules of Practice and Procedure provides that "[a] party may seek discovery at any time after a judge issues an initial notice" of hearing. It therefore was unnecessary for the administrative law judge to remand this case to the district director for the parties to "complete discovery."

in the case,” as long as she gives the parties “not less than 10 days’ notice of the hearing on such new issue.”⁶ *See generally Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *Ramirez v. Sea-land Services, Inc.*, 33 BRBS 41 (1999).

Third, the administrative law judge erred by summarily presuming that without remand to the district director, employer would be automatically and absolutely barred from seeking Section 8(f) relief. In requesting remand to the district director, employer made no reference to Section 8(f) or expressed any concern about the Section 8(f)(3) bar. *See* Emp. Affirmation in Support of its Motion to Remand dated April 30, 2019 and Reply Affirmation dated May 8, 2019. Section 8(f)(3) is an affirmative defense which the Director must raise and plead after employer files for Section 8(f) relief, *Abbey v. Navy Exch.*, 30 BRBS 139 (1996), and the requirement to file for Section 8(f) relief at the district director level does not apply if permanency was not at issue at that time. 33 U.S.C. §908(f)(3);⁷ *see Director, OWCP v. Vessel Repair, Inc. [Vina]*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

⁶Section 702.336(b) states:

At any time prior to the filing of the compensation order in the case, the administrative law judge may in [her] discretion, upon the application of a party or upon [her] own motion, give notice that [s]he will consider any new issue. The parties shall be given not less than 10 days’ notice of the hearing on such new issue. The parties may stipulate that the issue may be heard at an earlier time and shall proceed to a hearing on the new issue in the same manner as on an issue initially considered.

20 C.F.R. §702.336(b).

⁷Section 8(f)(3) states:

Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund’s liability for the payment of any benefits in connection with such claim, *unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.*

Consequently, we vacate the administrative law judge's orders remanding the case to the district director. The administrative law judge must determine if there are contested issues "and at least one [party] desires a compensation order."⁸ See *Baxter II*, slip op. at 6. If so, the administrative law judge "must retain jurisdiction, hold an evidentiary hearing, decide the contested issues, and issue a decision that awards or denies benefits," *id.*, (citing 33 U.S.C. §919(c)); see also 33 U.S.C. §919(e); *Aitmbarek v. L-3 Communications*, 44 BRBS 115, 120 n.8 (2010); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990), unless all of the requirements for remand to the district director are met. See 20 C.F.R. §§702.336(a), 702.351.

33 U.S.C. §908(f)(3) (emphasis added). The implementing regulation at 20 C.F.R. §702.321(b)(3) states:

Where the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ, an application need not be submitted to the district director to preserve the employer's right to late seek relief under section 8(f) of the Act.

⁸Thus, the administrative law judge's other articulated rationale for remanding this case to the district director - that claimant is being paid temporary total disability benefits by employer - ignores claimant's request for the issuance of a compensation order. See *Baxter II*, slip op. at 6; see also 33 U.S.C. §§918, 921(d), (e), 922; 20 C.F.R. §702.372.

Accordingly, we vacate the administrative law judge's Order Cancelling Hearing/Order of Remand and the Order Denying Claimant's Motion for Reconsideration of the Court's Remand to the District Director to Address Claimant's Issue of Permanent Disability Not Raised Previously, and we remand the case to the administrative law judge for action consistent with this decision.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge